No. 82-1401

In The

Supreme Court of the United States

October Term, 1982

IAIN CALDER and JOHN SOUTH,

Appellants,

vs.

SHIRLEY JONES,

Appellee.

On Appeal from the California Court of Appeal
Second Appellate District

BRIEF FOR APPELLEE

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QUESTIONS PRESENTED

1. Must a special First Amendment jurisdictional immunity be accorded members of the press who personally participate in the gathering of information for and the publication of a libelous article?

2. Under standard jurisdictional principles do the Due Process and/or Commerce Clauses preclude California's exercise of jurisdiction over members of the press who commit the tort of libel, knowing that the resultant publication will be widely distributed in California knowing plaintiffs reside there and that the main subject of the article relates to conduct alleged to have occurred in California, and whose investigation was directed there.

3. Does the Due Process Clause permit significant participants in tortious activity outside of California targeted at its residents, to evade jurisdiction simply because the wrongdoing happened to have been accomplished while working for a corporate employer, although a direct result of their personal conduct and activities.

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I. STATEMENT OF FACTS

In or about the middle of September, 1979, Appellant John South ("South"), a writer and reporter for defendant National Enquirer, Inc. ("Enquirer") (J.A. 59-60), telephoned Marty Ingels (Appellee's husband) and Shirley Jones ("Appellee")[1], at their residence in Beverly Hills, California, and read to Mr. Ingels a virtually identical draft of a soon to be published libelous and defamatory gossip article concerning Appellee and her husband (J.A. 78).

The text of the draft as read by South over the telephone charged that Ms. Jones, a well known and highly regarded actress (J.A. 8, 9), was in the habit of drinking so heavily on the set during the taping of her then current television show, "Shirley", that she made production impossible (J.A. 11). The article characterized Ms. Jones as a "crying drunk" who:

> "pours down vodka so fast that at first the crew thought she was drinking water. . . . She starts blurring her lines and by 3 o'clock in the afternoon she's a crying drunk and they have to stop shooting." (J.A. 11).

The article was to be not merely an insignificant item but a large "feature story" (J.A. 28). The draft of the article and the published story also contained numerous defamatory statements about Mr. Ingels (J.A. 11-13) who had an understandably immediate and perceptible emotional and physical reaction upon hearing the proposed story. He left the telephone to be sick, returned, and

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[1]Since the question of jurisdiction by this Court has been reserved until hearing, Shirley Jones will, without waiver of her claims and to avoid confusion, adhere to South and Calder's characterization of themselves as "Appellants" and of herself as "Appellee."

strongly denied to South each and every malicious and untrue element of the proposed article (J.A. 78). Nevertheless, on or about October 9, 1979, the Enquirer, at the direction of Appellant, Iain Calder ("Calder"), the Editor and President of National Enquirer, Inc. (J.A. 24; 8), second in command to only Generoso Pope (J.A. 24), published the libelous and defamatory article, which was subsequently distributed throughout California (J.A. 7-8; 38-39), and the entire North American continent (J.A. 37-41), to the Enquirer's nearly 5,000,000 purchasers (J.A. 38) and millions of other readers. As Appellants knew, California was its state of greatest circulation and subscribership (J.A. 40).

Appellee and Mr. Ingels contacted the Enquirer after publication and demanded that it print a retraction of the gossip, but Calder, whose sole responsibility it was to make such decisions (J.A. 28-29; 76) personally refused to do so (J.A. 29).

Calder's duties at the Enquirer, in addition to deciding whether to retract libelous articles, were, as president, according to his own testimony, to "oversee just about every function of the Enquirer" (J.A. 24), and, as editor, to "oversee the whole editorial process" (J.A. 24),[2] including specifically approving the publication of the subject article, the final page proof of which he reviewed and approved (J.A. 27-28), after South's telephone call to Appellee. It is also inferable that he discussed South's call approvingly with South and others both before and after it was made, since it was the Enquirer's policy to provide celebrities with advance warning of proposed Enquirer articles about them (J.A. 28).

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[2]Appellants trivialize Calder's total control over the publication of this article characterizing him as performing only "routine editorial services" (Appellants' Brief, p. 4).

Moreover, South also had other contacts with California besides the above-described telephone call to Appellee and her husband. His by-line appeared on the article (J.A. 13, 28) and he was primarily responsible for its concoction (J.A. 58-60). In conducting his "investigation" of the story, he had many telephone conversations with persons in California (J.A. 115), including more than one with an acknowledged "source" for the article and personal friend, Jane Chesis, a California resident (J.A. 50, 69-70, 74), with whom he had been dealing in his Enquirer capacity since December, 1978 (J.A. 58). South also had twenty to twenty-five telephone conversations with the only "source" for the Shirley Jones drunkenness on the set charge, John Robert Lucas, in the four months preceding publication of the subject article (J.A. 36) and still another with Betty Hager (J.A. 69, 74). South also interviewed Thom Keith for the article (J.A. 50). South was also provided by Chesis, in August or September, 1979, with at least five California telephone numbers of persons who could provide him with additional information about Appellee or her husband (J.A. 56) which he presumably called. Chesis was paid $50.00 for this information (J.A. 57). These numbers included the Appellee's husband's office and Appellee's home numbers (J.A. 56) which South utilized to reach them and read the article to them in advance of publication. South also spoke with Chesis in California after calling Ingels but before publication (J.A. 71). In their conversation, South said that he thought Ingels' reaction to the article was "quite funny" (J.A. 71). All of these phone calls, along with the many more he must have made to research this feature story, Appellants inaccurately describe as "only four long distance telephone calls" (Appellants' Brief ("AB") 16).

South met with Lucas in California on Enquirer business six times, at least twice prior to publication of the article (J.A. 34). Questioning of South regarding whether any of those California meetings related to this article was prevented by his counsels interposing a newsman's source objection and instruction not to answer (J.A. 35). Both the California Court of Appeal and even the trial court which ruled against Appellee appropriately concluded that South had at least one visit to California related to the subject article (Trial Court at J.A. 94, Court of Appeal at J.A. 115).[3]

Appellants improperly seek to rebut the clearly warranted inferences drawn by both courts below by presenting to this Court Lucas deposition testimony taken months after the trial court hearing and therefore not in the record below nor before this court (AB 16, APP. B). Appellee would very much prefer to present the significant jurisdictionally relevant information she has uncovered in two years since their motion, but feels that she is constrained by the general rule, unheeded by Appellants, that evidentiary matters revealed subsequent to a ruling are no proper part of the appellate record. Suffice it to say that the additional information strongly supports the judgment of the Court of Appeal. If this Court is inclined to permit an exception to the rule and consider such facts, Appellee would urge permission and the opportunity to augment the record as Appellants have done.

With respect to the credibility of the improperly proffered Lucas' testimony, a few observations are appropriate. Mr. Lucas received a "special bonus" from the En-

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[3]Despite the clear evidence below, Appellants apparently relying on the evidence they improperly seek to present for the first time to this Court, state "it was uncontradicted that South did not travel to California in connection with the article" (AB 5).

quirer just prior to the last session of his deposition, reinforcing other evidence suggesting premeditated efforts to assure favorable testimony.[3a] Furthermore, Lucas' deposition, although demonstrably riddled with fabrication and inconsistency, is highly favorable to Appellee in those portions which Appellants have not chosen to reproduce. When that is done, the finding of both courts below, of at least one article related visit to California, was amply justified and is binding upon this Court.

In addition to the above contacts specifically related to the underlying cause, South has had other significant contacts with California. In the four years prior to publication, he made between twenty and forty-four business trips to California of an average length of one to two weeks on Enquirer stories (J.A. 32; 66), and on one such trip sought alternative employment in California since:

> "he had to travel so much out here it would give him more time with his children if he obtained employment here." (J.A. 68).

On still another trip to Los Angeles, after publication of this article, South met with Jane Chesis at Schwab's Drug Store on Sunset Boulevard to discuss her pending deposition in this lawsuit (J.A. 48-51). South also met with Chesis at the Beverly Hillcrest Hotel a week earlier (J.A. 49) regarding Chesis' contacts with Appellee's counsel. They also talked on the telephone many times (J.A. 50), and she had also warned him in Florida, prior to the deposition, that she had been served with process (J.A. 50).

[3a] Michael Hoy, an Enquirer editor, testified that the Enquirer was concerned "whether he [Lucas, the sole source of information concerning Appellee's alleged drinking on the set] was cooperating with Mr. Ingels' lawyers as opposed to our own." So concerned, in fact, that on Iain Calder's approval "because Bobby Lucas was involved in this lawsuit," the "special bonus", which consisted of an "exaggerated claim," was paid. (Depo. Hoy, 6-15-83, p. 104).

South also had approximately a dozen non-Enquirer related personal business acquaintances in California (J.A. 33), suggesting even more contacts than appear on the record, unrelated to his Enquirer dealings.[4] Furthermore, South has on numerous occasions testified in California courts by affidavit in support of nonjurisdictional motions in this case and others (J.A. 86-89).

As to Calder, although his personal appearances in California in connection with the subject article do not appear on the record, he was in personal attendance during virtually the entire trial in the matter of *Carol Burnett v. National Enquirer, Inc.,* Los Angeles Superior Court No. 157213 (J.A. 46-47), another Enquirer celebrity alcoholism libel case, during March, 1981, in which he testified and observed, demonstrating both his knowledge that such stories would lead to litigation in California and the relative convenience of his defending an action there (J.A. 46).

After Calder refused to print a retraction, Jones and Ingels initiated in Los Angeles County Superior Court, on or about November 20, 1979, this action for libel, invasion of privacy and intentional infliction of emotional distress against the Enquirer, South, Calder, and the Enquirer's Los Angeles County distributor, Sunset News Company (J.A. 7-10), alleging that Appellants acted "by virtue of their own motives as individuals" in addition to "acting within the course and scope of their employment." (J.A. 8).

The Enquirer answered the Complaint without contesting jurisdiction, but Appellants moved to quash serv-

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[4]Appellants assert South had no personal business activity in California (AB 5), relying upon Appellants' one page affidavits prepared by counsel, while ignoring the spontaneous deposition testimony of South of "personal business acquaintances" in California.

ice of summons made on them pursuant to California's long-arm statute, Code of Civil Procedure § 410.10 (J.A. 15-16).

Both the trial court which ruled against Appellee and the California Court of Appeal concluded that the jurisdictional facts presented warranted the imposition of jurisdiction.[5] However, the Court of Appeal reversed the trial court's conclusion that there was a special, more stringent jurisdictional analysis required in "First Amendment" cases which would alter the result of the traditional analysis,[6] concluding that jurisdiction over Appellants "must be determined in accord with traditional principles unaffected by First Amendment considerations." (J.A. 111).

In applying traditional jurisdictional principles the California Court of Appeal reasoned that "[e]very state has a natural interest in effects occurring within its territory, even if the act causing those effects was committed elsewhere (*See* Rest. 2d Conf. of Laws, § 37, com. a). . . . If a defendant commits an act or omission outside the forum state *with the intent* to cause tortious effect within the state, the state may exercise jurisdiction over the defendant as to any cause of action arising from the effects." (J.A. 113).

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[5]The trial court stated:

"Indeed if the injury complained of in this case involved a physical injury sustained as a result of a physically defective magazine shipped into California, then the analysis would end at this point and the motion to quash would be denied. [Citation omitted]" (J.A. 95)

[6]The trial court stated:

"The question becomes, then, whether in assessing the fundamental fairness of the proposed assertion of jurisdiction, the Court should weigh and consider additional factors in cases where freedom of the press is involved." (J.A. 95). The trial court did so (J.A. 96).

Finally, the Court of Appeal concluded that the facts warranting jurisdiction over Appellants were unaffected by the fact that they engaged in the wrongful and malicious conduct in the course of their employment with the Enquirer. (J.A. 116-117).

II. SUMMARY OF ARGUMENT

There is no due process restriction on subjecting to jurisdiction significant participants in intentional and willful conduct, not only foreseeably impacting a forum but targeted there.

South's above recited numerous California contacts in investigating the story and callously inflicting emotional distress on Appellee by reading the subject article to her husband at their California residence before publication, not for purposes of assessing its accuracy but to obtain a useful quotation, warrants imposition of jurisdiction wholly apart from the well established "effects doctrine" articulated in RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971).

Calder's intentional tortious conduct outside of California, on the other hand, in causing certain injurious effects in California presents the clearest case for adopting the "effects doctrine" which application is well established among the state courts and legislatures.

Appellants' efforts to evade jurisdiction by seeking the creation of new constitutional immunities, a First Amendment derived jurisdictional privilege for the press and a due process derived "fiduciary shield" immunity for intentional wrongdoers acting in the corporate employ, are both legally and logically unwarranted and should be rejected.

The First Amendment privilege sought is not presaged by *New York Times v. Sullivan*, 376 U. S. 254 (1964)

and its progeny nor justified by any logical policy consideration. Its acceptance, in fact, flies in the face of *New York Times* and reflects an end-run around that line of cases to accomplish that which it has precluded.

The "fiduciary shield" immunity, born of confusion, incapable of being logically stated, riddled with internal contradiction, and lacking in reasoned justification is inapplicable to the facts presented and should not, at any rate, be imbued with constitutional significance. Even those few courts which have adopted it as a constitutional principle have done so only when jurisdiction over individual employees is sought to be imposed solely on the basis that the court has jurisdiction over the corporate employer, and not on the basis of any actions or conduct of the individual. It is inapplicable where, as here, jurisdiction is based on the individual's own conduct.

Finally, defendant has failed to demonstrate any unreasonable burden or discrimination against interstate commerce which would justify striking down jurisdiction over Appellants based on the Commerce Clause. Jurisdiction over tortious wrongdoers will not curtail commerce, it will only curtail wrongdoing.

III. ARGUMENT

A. THE FIRST AMENDMENT ACCORDS NEITHER THE MEDIA NOR ANYONE ELSE A SPECIAL JURISDICTIONAL IMMUNITY.

Ignoring the significant rights of libel plaintiffs,[6a] Appellants claim entitlement to a special First Amendment derived jurisdictional preference. (AB 33-46; Amicus Curiae Brief of the Association of American Publishers,

[6a]The importance of the interests which Appellants choose to ignore has perhaps been most succinctly described by Professor Tribe:

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Inc. ("AAP Brief") pp. 8-11; Brief Amici Curiae of the Reporters' Committee for Freedom of the Press, et al. ("RB"), pp. 18, et seq.) Appellants and Amici seek to create and fashion a First Amendment derived protective, jurisdictional umbrella permitting immunized contact with California so long as their contacts are related to publication (AB 19). This special treatment is sought in a factual setting more deserving of Justice White's apt statement:

> "[I]ts freedom [the presses] does not carry with it an unrestricted hunting license to prey on the ordinary citizen." *Miami Herald Pub. Co. v. Tornillo*, 418 U. S. 241, 263 (1974) (White, J., concurring).

The First Amendment has never contemplated creation of a diplomatic immunity or jurisdictional privilege for traveling reporters, stringers or other persons ostensibly trying to uncover information to give, sell or convey to the media. Analogous claims for special treatment to benefit the press have been repeatedly rejected by this Court, and the overwhelming number of well considered lower federal and state court decisions have similarly done so.

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"Both privacy and reputation . . . involve interests of constitutional dimension; when government acts to limit the untrammeled gathering, recording, or dissemination of data or statements about an individual, of course it inhibits speech—but it also vindicates the individual's ability to control what others are told about his or her life. Such control constitutes a central part of the right to shape the 'self' that any individual presents to the world. . . . It is breached, . . . with unmistakable force, when one's good name is deliberately and falsely besmerched, doing violence to one's public identity. Not surprisingly, therefore, defamation has long been regarded as a form of 'psychic mayhem', not very different in kind, and in some ways more wounding, than physical mutilation." TRIBE, AMERICAN CONSTITUTIONAL LAW, pp. 648-649 (1st ed. 1978).

1. The Media Is Entitled To Receive Only The Same Even-Handed Application Of Jurisdictional Law As Other Non-Media Defendants.

Chief Justice Burger, in *First National Bank of Boston v. Bellotti*, 435 U. S. 765, 802 (1978) (concurring opinion), stated:

> "'[T]he purpose of the Constitution was not to erect the press into a privileged institution '. . . the liberty of the press is no greater and no less' . . . than the liberty of every citizen of the Republic. *Pennekamp v. Florida*, 328 U. S. 331, 364 (1946) (Frankfurter, J., concurring)".

This statement appropriately reflects this Court's repeated holdings that the press may be subject to application of laws uniformly applicable to others. *Grosjean v. American Press Co.*, 297 U. S. 233 (1936) (even-handed taxes); *Associated Press v. National Labor Relations Board*, 301 U. S. 103 (1937) (National Labor Relations Act); *Okla. Press Publishing Co. v. Walling*, 327 U. S. 186 (1946) (Fair Labor Standards Act); *Breard v. Alexandria*, 341 U. S. 622 (1951) (ban on solicitation house to house); *Citizen Publishing Co. v. United States*, 394 U. S. 131 (1969) (Sherman Anti-Trust Act); *Branzburg v. Hayes*, 408 U. S. 665 (1972) (revealing sources at grand jury indictment hearing); *Pell v. Procunier*, 417 U. S. 817, 834 (1974) ("[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public"); *Herbert v. Lando*, 441 U. S. 153 (1979) (editorial processes not immunized from discovery in a libel action).

This Court's recent decision in *Minneapolis Star & Tribune Company v. Minnesota Commissioner of Revenue*, 103 S. Ct. 1365 (1983), is totally consistent with the foregoing. As stated in Justice O'Conner's opinion for the Court, the issue there was "a State's power to impose a

special tax on the press and, by enacting exemptions, to limit its effect to only a few newspapers." 103 S. Ct. at 1367. The Court unequivocally reiterated that consistent with the First Amendment *newspapers could be subjected to non-discriminatory, generally applicable regulations.* 103 S. Ct. at 1369-1370.

Appellants and Amici have failed to provide any meaningful authority suggesting that, or why, the ordinary minimum contacts test should not be applied to them.[7] The media's desire to avoid facing the music at all, albeit even the mellifluous *New York Times* symphony composed by this Court for its benefit, is all that is urged in support of their claims.

2. The Substantive Law, Not Procedures, Are Best Suited To Accommodate The First Amendment.

This Court has gone far in recent years in considering the First Amendment by according the press and other defamation defendants significant protections incorporated into the substantive constitutional law of libel. *See, New York Times v. Sullivan, supra;*[8] *Curtis Publishing Company v. Butts,* 388 U. S. 130 (1967); and *Gertz v. Robert Welch, Inc.,* 418 U. S. 323 (1974).

This Court has already determined to confront First Amendment issues in libel cases head-on in the substantive law rather than by indirection in the law of minimum

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[7]As discussed below the now largely discredited view of the Fifth Circuit is about all the authority Appellants can muster.

[8]Some of the protections include: (a) the burden of proving truth cannot be on the defendant, plaintiff must prove falsity 376 U. S. at 279; (b) constitutional malice, knowledge of falsity or reckless disregard for falsity, is required in order for a public figure or public official to prevail, 376 U. S. at 279-280; (c) malice must be proven by "clear and convincing" evidence, 376 U. S. at 285-286; and (d) only damages for actual not presumed injury may be recovered, 376 U. S. at 283-284.

contacts jurisdiction. It has achieved a delicate balance of interests amply protecting libel defendants while at the same time refusing to shut the courthouse door to libeled individuals.

As stated in *Gertz v. Robert Welch, Inc., supra*, "The *New York Times* standard defines the level of constitutional protection appropriate to the context of defamation of a public person." 418 U. S. at p. 342. *New York Times* did not contemplate nor suggest that the balance of interests it achieved should be upset by additional First Amendment protections accorded in the procedural context. *Herbert v. Lando*, 441 U. S 153 (1979).[9]

The stringent First Amendment protections accorded by *New York Times* and its progeny have made the proof in libel actions difficult and extremely costly. *Herbert v. Lando*, 441 U. S. at 176.[10] It is most assuredly these additional burdens and expenses which account for the high expense of defending and prosecuting libel actions (AB 42) and the small number of trial and appellate level defamation cases with mass media defendants (RB 16,

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[9]*Herbert* stated in connection with another asserted special procedural protection claimed by the media:

"Nor did these cases [*New York Times, Curtis Publishing*, and Gertz] suggest any First Amendment restriction on the sources from which the plaintiff could obtain the necessary evidence to prove the critical elements of his cause of action." 441 U. S. at 160.

"[A]ccording an absolute privilege to the editorial process of a media defendant in a libel case is not required, authorized, or presaged by our prior cases, and would substantially enhance the burden of proving actual malice, contrary to the expectations of *New York Times, Butts, and similar cases.*" 441 U. S. at 169.

[10]"The plaintiff's burden [in defamation actions] is now considerably expanded. In every or almost every case, the plaintiff must focus on the editorial process and prove a false publication attended by some degree of culpability on the part of the publisher. If plaintiffs in consequence

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fn. 6).[11]

Despite the fact that *New York Times* and its progeny carefully define the level of protection warranted by the First Amendment, Appellants and Amici seek to redefine it in a significantly different and more burdensome manner as to plaintiffs. Whereas *New York Times* adjusted the substantive law of libel to accommodate important First Amendment concerns, Appellants now seek to impede libel plaintiffs' very access to court.[12]

Such procedural impediments go beyond the burdens imposed by *New York Times*. As stated in *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241, 262 (1974) (White, J., concurring):

"... [W]e have cherished the average citizen's reputation interest enough to afford him *a fair chance*

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now resort to more discovery, it would not be surprising; and it would follow that the costs and other burdens of this kind of litigation would escalate and become much more troublesome for both plaintiffs and defendants." 441 U. S. at 176.

[11]The Reporters' Brief cites for the proposition that "Reporters and editors are exceptionally vulnerable to defamation suits" a statistical survey showing such cases increasing as follows: 1977—52; 1978—79; 1979—84; 1980 (through Sept. 30) —76. (RB 16)

Quite to the contrary, it is remarkable that given the vast number of mass media,—11,000 magazines, 1,700 daily newspapers and 7,500 weekly and semi-weekly newspapers (RB 25), —and their voluminous daily output on divergent subjects that so few defamation lawsuits have resulted. The "significant increase" in number of these cases claimed by the Reporters' Brief and alleged attributable to "frivolous plaintiffs" suits (AB 42), or "vulnerable reporters" (RB 16), simply is no cause for alarm given the small numbers involved. Properly interpreted, there have been only a small number of such suits largely because of *New York Times* and its progeny and the additional costs and burdens they have placed on libel plaintiffs.

[12]If a First Amendment jurisdictional privilege is accorded the media, non-public figure or public official plaintiffs will be equally impacted by the immunity potentially having even greater practical consequences on that group.

to *vindicate himself in an action for libel. . . . [H]e has had at least the opportunity to win a judgment.*" [Emphasis added.]

Appellants now seek to make even the opportunity for a "fair chance" more difficult.[13]

3. A First Amendment Immunity For The Press Would Only Create Confusion In The Already Uncertain Area Of Jurisdiction.

Minimum contacts analysis is a difficult one " in which few answers will be written in black and white: the greys are dominant and even among them the shades are innumerable." *Kulko v. California Superior Court*, 436 U. S. 84, 92 (1978). A First Amendment jurisdictional privilege virtually immunizing media defendants, or at least requiring a significantly higher level of contacts to impose jurisdiction, will lay the groundwork for different, varying jurisdictional scrutiny levels for other equally worthy interests. Thus, the shades of gray inherent in even the traditional standard would be multiplied many times over.

Since the "First Amendment does not 'belong' to any definable category of persons or entities: [i]t belongs to all who exercise its freedoms" *First National Bank of Boston v. Bellotti, supra*, at 802, (Burger, C. J., concurring), the jurisdictional preference would appear to apply to any defendant whose contacts with a forum or tortious conduct are effected by "First Amendment" activity. The difficult issue of what persons and what types of First Amendment activity might be subject to this special First Amendment jurisdictional consideration would be raised.

In short, minimum contacts analysis should not be further encumbered or needlessly complicated.

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[13]Though the Enquirer did not contest jurisdiction in this case, the jurisdictional immunity which Appellants urge would arguably insulate the Enquirer, and other nationwide publications, so long as their activities were First Amendment related.

4. In Light Of The De Minimus "Chilling Effect," Practical Considerations Compel Rejecting A Special First Amendment Minimum Contacts Test.

Appellants contend that failure to impose a special First Amendment jurisdictional standard, will have a chilling effect on the free press (AB 44), significantly elevate litigation costs (AB 44), and place the press in a position to be blackmailed by "frivolous suits" (AB 42).

However, upon analysis, Appellants' contentions reduce to nothing more than a claim that any time a media defendant is called to answer for its actions there is a "chilling effect." For, the additional "chill" created by suits away from Appellants' principal place of business is only marginally greater than the alleged "chill" from any lawsuit including one right next door.[14] However, that "chill" is the very "chill" which *New York Times* found acceptable in balancing First Amendment rights against those of defamed individuals seeking redress.[15] Furthermore:

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[14]It takes little understanding of the litigation process to appreciate that most pre-trial hearings are conducted by affidavit that can be supplied with equal ease from outside the forum as within. Further, depositions of Appellants cannot be compelled in California (California Code of Civil Procedure § 2019), nor can they even be compelled to attend trial in California. Thus, the only practical additional burden would be Appellants' actual, non-compelled attendance at trial which is comparatively insignificant to the overall costs in such litigation.

[15]*Herbert* v. *Lando, supra,* at 171 aptly stated:

> "But if the claimed inhibition flows from fear of damages liability for publishing knowing or reckless falsehoods, those effects are precisely what *New York Times* and others cases have held to be consistent with the First Amendment. Spreading false information in and of itself carries no First Amendment credentials. '[T]here is no constitutional value in false statements of fact' [Citation omitted]."

> "[T]he press . . . is steadily becoming more powerful and much less likely to be deterred by threats of libel suits." *Miami Herald Publishing Co. v. Tornillo, supra,* at 263. (White, J., concurring).

This statement is particularly poignant at bar applying to a publication of vast national circulation, resources and readership, and its principal employees.

Appellants' contentions that the costs of defending suits in other forums will make litigation prohibitive is empirically unsupported and, interestingly, made by Florida parties employing Washington, D. C. counsel to represent them as lead counsel in California litigation, an indisputably more expensive means of defense than obtaining local California counsel.[16] This is hardly the conduct of parties teetering on the brink of being "wipe[d] out . . . financially" (AB 42).[17]

Appellants' claim that failure to accord them jurisdictional immunity will enhance the likelihood of "frivolous suits" is equally meritless.[18] If there is any risk of

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[16]Use of Washington, D. C. counsel, of course, adds to long distance telephone charges, federal express charges and extensive air fare, hotel, legal fees and other traveling expenss, incurred each time a hearing or deposition is scheduled in California.

[17]It should be further observed that counsel for Appellants have adopted a defense strategy in connection with their representation of the Enquirer and Sunset News Distributing, of exhaustive discovery and use of the appellate process as evidenced by its Petition for Certiorari to this Court just two months after this Petition. *National Enquirer, Inc. v. Superior Court of California, cert. denied* 51 U.S.L.W. 3902 (1983) (No. 82-1770). Though this defense strategy is a permissible one, Appellants should not now be heard to complain of the costs involved.

[18]Without justification, Appellants suggest that Ingels' dismissal of this matter demonstrates that this is just such a "frivolous suit." However, such inaccurate, irrevelant, and idle speculation ignores the multitude of other possible, more likely, and here present explanations for such action, such as the cost to him of maintaining both his and Appellee's lawsuit in the face of a "billions for defense" strategy.

frivolous suits, it is equally present in locally filed actions. Furthermore, substantive and procedural state laws are designed to prevent and/or penalize frivolous suits such as by authorizing civil suits for malicious prosecution. Clearly, *The Length of The Long Arm*, 9 J. OF PUB. L. 293, 302 (1963).

In the modern world it is ludicrous to suggest that large national publications and their key employees will fail to publish controversial stories that can be gathered only out of state, which they perceive will enhance circulation, simply because they may be sued there.

When put in proper perspective, the additional cost of litigating in a distant forum is comparatively small when compared to the costs of litigating a libel matter at all. The horrible consequences suggested by Appellants for failure to provide them special insulation from jurisdiction are more hypothetical than real.

5. The Courts Which Have Decided This Precise Issue, Have Overwhelmingly Rejected Adoption Of A First Amendment Jurisdictional Test.

Though Appellants claim that "the majority of state and federal courts that have considered the issue have unhesitatingly applied the First Amendment's speech and press protections as part of their analysis of extraterritorial jurisdiction" (AB 37-38), in fact, quite the contrary is the case. The only federal circuit court to accept that proposition is the Fifth Circuit in *New York Times Company v. Connor*, 365 F. 2d 567 (5th Cir. 1966), and subsequent cases. *See, E. G. Walker v. Savell*, 335 F. 2d 536 (5th Cir. 1964); *Wolfson v. Houston Post*, 441 F. 2d 735 (5th Cir. 1971); *Edwards v. Associated Press*, 512 F. 2d 258 (5th Cir. 1975); and *Cox Enterprises, Inc. v. Holt*, 678 F. 2d 936 (11th Cir. 1982).[19]

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[19]The Cox court, in the Eleventh Circuit, which was recently created out of the Fifth Circuit, owed its reliance on *Connor* to the fact that it considered itself bound by 'applicable law previously developed in the former Fifth Circuit.' 678 F. 2d at 937.

It should be noted that Professors Leflar and Weinstein, whom Appellants view to be in their camp (AB 39), wrote prior to *New York Times v. Sullivan.* Thus, they were unaware of the stringent protections which this Court would shortly thereafter place in the substantive law of libel. Their concern for adding procedural protections in the absence of any protections at all is therefore understandable.[20]

The *Connor* case has itself been limited and qualified by subsequent Fifth Circuit opinions. In *Curtis Publishing Company v. Golino,* 383 F. 2d 586, 590-591 (5th Cir. 1967), *Connor* was limited to the newspaper situation it presented, excluding from its ambit cases involving magazines. *Edwards v. Associated Press,* 512 F. 2d 258, 266 (5th Cir. 1975), further undercut *Connor* by stating that it indicated "not so much a rule as it expresses a cautionary note" and acknowledged that *Connor* had "not been greeted with enthusiasm" (512 F. 2d at p. 266, n. 29). "The majority of recent cases have rejected *Connor,* concluding that First Amendment considerations are irrelevant to a jurisdictional analysis." Scott, *Jurisdiction Over The Press: A Survey And Analysis,* FED. COM. L. J. 32: 19-53, 19 (1980).

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[20]Appellants suggest that RESTATEMENT (SECOND) CONFLICT OF LAWS, § 37 at 159 (1971) supports their claim that the First Amendment must be considered (AB 39). However, such recitation is misleading. It ignores the clearly non-committal term "may" and that section's earlier caveat that:

> *"The Institute expresses no opinion whether in situations where the interests of the defendant are protected by the First and Fourteenth Amendments of the Constitution, it is necessary that a State have a more substantial basis for the exercise of judicial jurisdiction over a non-resident defendant than would otherwise be required."* (Emphasis added.)

Weighed against this scant and discredited Fifth Circuit authority are the decisions of the Second, Ninth and Tenth Circuits rejecting *Connor*. The Ninth Circuit in *Church of Scientology v. Adams*, 584 F. 2d 893, 899 (9th Cir. 1978), observed that the proposition that there is increased protection from jurisdiction in First Amendment cases is one whose

> ". . . soundness is open to question . . . [W]e observe that first amendment protections are better developed in the context of substantive defenses on the merits rather than at the initial jurisdictional stage of a defamation proceeding."

In *Anselmi v. Denver Post*, 552 F. 2d 316, 324 (10th Cir.) *cert. denied sub nom., Times Mirror Co. v. Anselmi*, 432 U. S. 911 (1977), the Tenth Circuit stated:

> "Whether there is a First Amendment defense is to be determined when the case is tried and not as a matter of reason and logic affect the outcome of a personal jurisdiction question such as we have here. . . . To hold as did the Fifth Circuit that the First Amendment has to be thrown on the scales as an added impediment in media cases gives to the media an additional arrow which is not appropriate in a determination as to whether the contacts are legally sufficient to constitute due process."

In *Buckley v. New York Post*, 373 F. 2d 175, 182 (2nd Cir. 1967), Judge Friendly, in addition to referring to the "vague First Amendment standard" of *Connor*, pointedly observed:

> "We cannot but wonder whether the Connor court would have felt the same way if the *dramatis personae* instead of being 'Bull' Connor and a newspaper internationally known for its high standards, had been an esteemed local educator or clergymen and an *out of state journal with a taste for scandal* which had circulated 395 copies of a libel stating he had corrupted the morals of the young." (Emphasis added.)

Appellants inaccurately suggest that *Buckley* supports their position citing Judge Medina's concurring opinion (AB 38) (RB 20).[21] It is interesting, that Appellants have emphasized Judge Medina's concurring opinion, for Judge Friendly's opinion for the court has been acknowledged to criticize the *Connor* formula.[22]

Lower state and federal court decisions have similarly rejected a special First Amendment jurisdictional test. In *Johnstone v. Time, Inc.*, 321 F. Supp. 837, 846 (D. N. C. 1970), the court rejected it based upon the changes in substantive defamation law established by *New York Times v. Sullivan* and its progeny. The majority of other state and lower federal court cases and commentators considering such a First Amendment jurisdictional preference are in accord in rejecting it.[23]

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[21]AAP Brief, 7, fn. 4, also cites *Buckley v. New York Post, supra.*

[22]*See, Jurisdiction Over The Press: Survey and Analysis,* FED. COM. L. J. 32: 19-53, 19, fn. 4 (1980), which article counts *Buckley v. New York Post, supra,* among those cases not warmly receiving *Connor; Edwards v. Associated Press, supra,* where the Fifth Circuit itself cites *Buckley v. New York Post Corporation* for the proposition that *Connor* "has not been greeted with enthusiasm."

[23]*Cordell v. Detective Publications, Inc.*, 307 F. Supp. 1212, 1216 (E. D. Tenn. 1968); *Novel v. Garrison*, 294 F. Supp. 825, 833 (N. D. Ill. 1969). "The soundness of applying these First Amendment considerations to jurisdiction questions has been questioned"; *David v. National Lampoon, Inc.*, 432 F. Supp. 1097 (D. S. C. 1977); *Sipple v. Des Moines Register and Tribune Company*, 82 Cal. App. 3d 143, 147 Cal. Rptr. 59 (1978); *Long-Arm Jurisdiction over Publishers: To Chill a Mocking Word*, 67 COLUM. L. REV. 342 (1967); *Due Process And First Amendment Considerations In Libel Cases*, 52 IOWA L. REV. 1034 (1967); and, *Constitutional Limitations to Long-Arm Jurisdiction In Newspaper Libel Cases*, 34 U. CHI. L. REV. 436 (1967). *See also*, libel cases in which the ordinary standard of jurisdiction was applied with no special First Amendment consideration; e. g., *McGuire v. Brightman*, 79 Cal. App. 3d 776, 145 Cal. Rptr. 256 (1978).

The federal district court cases cited by Appellants are all cases which while containing some language indicating acceptance of the discredited *New York Times v. Conner* are otherwise inapposite.[24]

This court has already created significant protections for the media in libel actions. To manipulate jurisdictional law to accord further media protection, while curtailing plaintiffs' access to court, is unwarranted and unnecessary. The proper balance has already been achieved.

B. APPLYING THE TRADITIONAL MINIMUM CONTACTS TEST, THE DUE PROCESS CLAUSE PROVIDES NO SANCTUARY FROM JURISDICTION TO THOSE WHO ENGAGE IN INTENTIONAL AND MALICIOUS TORTIOUS ACTIVITY IN ONE STATE AIMED AT AND CAUSING INJURIOUS EFFECTS TO RESIDENTS OF THE FORUM.

It is clear that since there is no special First Amendment jurisdictional immunity, the traditional minimum contacts analysis is appropriate. However, before it can be applied the inapplicable hypotheticals alluded to by Appellants and Amici, to buttress the "publisher's plight" (AAP Brief, 10) which they claim to exist, must be clearly distinguished from the factual reality presented.

The AAP Brief talks about suits in "remote jurisdictions" (AAP Brief, 8) though this suit was filed where

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[24]*See, e. g., McCabe v. Kevin Jenkins & Associates, Inc.*, 531 Fed. Supp. 648 (E. D. Pa. 1982) (turning on the narrower long-arm statute of Pennsylvania and substantially lesser contracts.); *Margoles v. Johns*, 333 Fed. Supp. 942 (D. D. C. 1971), *aff'd.* 483 F. 2d 1212 (D. C. Cir. 1973) (decided as a matter of interpretation of a Washington, D. C. long-arm statute which was not as broad as California's, and at any rate its favorable reference to the *New York Times v. Connor, supra,* was not even commented upon nor referred to in the affirming circuit court opinion.); *Gonzales v. Atlanta Constitution*, 4 Media Law Reporter, 2146 (N. D. Ill. 1979) (an unofficially reported opinion relying without analysis on the much discredited *Connor* case.).

Appellants knew plaintiff resided, where the entertainment industry about which they wrote was located, where much of their investigation (numerous telephone calls and at least one visit by South) was focused, where the Enquirer had nearly 60,000 subscribers and a total circulation in excess of 600,000, and where South made dozens of visits on Enquirer and personal business in the years immediately prior to publication. The AAP Brief talks of "forum shopping" (AAP Brief, 3) ignoring the fact that this lawsuit was filed at the residence of plaintiff without regard to obtaining forum shopping advantages.[25] The AAP Brief talks of getting a publisher into court simply because it had the "good fortune of selling a small number of works in that jurisdiction", though the Enquirer sold over one-half million copies of the subject article in California.

Other claims of Appellants are particularly meritless in the facts presented. Though participants in the writing and publication of a vicious article asserting that a professional entertainer was "a crying drunk" in connection with her professional endeavors, they now suggest that injury from such a story is "more easily feigned" than physical injury (AB 31).[26]

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[25]Suit at the residence of plaintiff was viewed as a significant factor in *International Milling Co. v. Columbia Transp. Co.*, 292 U. S. 551, 520 (1933), *Roy v. North American Newspaper Alliance*, 106 N. H. 92, 205 A. 2d 844 (1964) and clearly distinguishes the facts of *Keeton v. Hustler Magazine, Inc.*, 682 F. 2d 33, *cert. granted* 51 U. S. L. W. 3552 (1983) (No. 82-485) where suit was not initiated at plaintiff's residence. It is interesting that though Appellants utilized *Keeton* extensively in their "Statement As To Jurisdiction" pp. 20-21 in order to obtain a hearing by this Court, they omit even a cursory reference to it in their Brief. The reason is apparent; when contrasted with the facts in *Keeton* the facts at bar cry out for sustaining jurisdiction.

[26]TRIBE, AMERICAN CONSTITUTIONAL LAW, at 648-649 (1st ed. 1978) has analogized the injury from a libel to the most

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Finally, Appellants assert that the California Court of Appeal was incorrect in presuming intention to cause injury to plaintiffs, "jurisdiction by allegation" (AB 31; RB 13-14), despite the fact that the article speaks for itself with regard to intention, and South with Calder's presumed knowledge, called Appellee and her husband before publication, read the article, and was specifically told that it was false and devastating yet published in virtually the identical form read. In the light of such evidence, to call this "jurisdiction by allegation" is to misread the facts.[27] Furthermore, the relevant jurisdictional contact is intent to cause *effects* in California not necessarily intent to injure.[28] The intent to cause effects is manifest in the facts presented.[29]

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injurious of physical crimes, mayhem. With mayhem at least the possibility of full recovery from the physical injuries exists. The truth however, never catches up with the lie. *See also, Abbott Power Corp. v. Overhead Electric Co.*, 60 Cal. App. 3d 272, 278-279, 131 Cal. Rptr. 508, 512 (1976).

[27]The purpose of this assertion is simply to require a full trial to determine intent and thus makes jurisdiction on that ground nearly impossible. As stated in *United States v. Montreal Trust Co.*, 358 F. 2d 239, 242 (2d Cir. 1966), *cert. denied* 324 U. S. 982 (1966):

> "The District Court, in dealing with this issue . . . placed a too heavy a burden on the government in requiring it to establish a strong factual basis upon which jurisdiction is predicated in this case. At this early stage of the proceedings, the government should not have been required to submit proof which would, in effect, establish the validity of its claim and its right to the relief sought."

[28]Although even that intent is properly inferred from the record.

[29]Appellants ignore the special significance of the fact that their conduct was intentionally aimed at California. Fortunately, this factor has not escaped notice by well reasoned opinions. *Murphy v. Erwin-Wasey, Inc.*, 460 F. 2d 661, 664 (1st Cir. 1972).

> "The element of intent also persuades us that there can be no constitutional objection to Massachusetts asserting jurisdiction. . . ."

When the law is properly analyzed and applied to the true facts without Appellants' hyperbole, it is clear that due process presents no barrier to jurisdiction over Appellants.

1. The Applicable Jurisdictional Principles.

At bottom, the jurisdictional principles here are grounded on notions of equity and fairness as set forth in *International Shoe Co. v. Washington,* 326 U. S. 310 (1945). Thus, exercising jurisdiction does not offend due process if the defendant has:

> "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' [citation omitted]. 326 U. S. at p. 316.
>
> "Those demands [of due process] may be met by such contacts . . . as make it reasonable . . . to require the corporation to defend . . . there." 326 U. S. at p. 317.[30]

In *McGee v. International Life Insurance Co.,* 355 U. S. 220 (1957) in a commercial, non-tort context this Court concluded that even an isolated contact which had a "substantial connection with that state" (355 U. S. at 223) was a sufficient basis for jurisdiction applying *International Shoe* principles.

At bar it is neither unfair nor violative of traditional notions of fair play to subject persons engaging in intentional wrongful conduct directed at a particular state to jurisdiction in that state when those very acts cause the foreseen injury.

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[30]Though *International Shoe* dealt with jurisdiction over a corporation its precepts are clearly applicable to individual defendants. *Shaffer v. Heitner,* 433 U. S. 186, 204, fn. 19 (1976). Cleary: *The Length of the Long Arm,* 9 J. OF PUB. L. 293, 298 (1963) ("Distinctions In Principle No Longer Exist Between Individuals and Corporations for Purposes of Jurisdiction."). Cleary and Seder, *Extended Jurisdictional Bases for the Illinois* Courts, 50 N. W. U. L. REV. 599, 603 (1955). Foster, *Personal Jurisdiction Based on Local Causes of Action,* WIS. L. REV. 522, 544-45 (1956).

2. The "Effects Doctrine" Is Well Grounded In Logic And Legal Authority Warranting Its Adoption In The Factual Context Presented.

a. The Issue Presented At Bar.

At bar, South's contacts with California were sufficient to justify exercising jurisdiction over him without resort to the "effects doctrine."[31] He made many telephone calls to California in his investigation of the article, made at least one visit to California to meet with a source of the subject article concerning it and telephoned Appellee and her husband to read them the article before publication, thereafter wholly ignoring their protests of falsity.

Calder, on the other hand, admittedly will be subject to jurisdiction only if this Court accepts the "effects principle" as applied to the intentionally tortious conduct in which he was substantially involved.

In determining whether the "effects principle" comports with due process, it is noteworthy that it is not presented in the context of complex business transactions in one state whose economic and other effects in another state evade easy anticipation and control. Also not presented is the situation of an unintentional act in one state causing unforeseeable consequences in another nor even an unintentional act in one state causing effects which were foreseeable but unforeseen. Rather, it is the clearest possible case for application of the "effects doctrine": an act done outside the forum state with the express intention of causing effects in the forum.

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[31] As properly stated by the California Court of Appeal: "[A]part from the tortious effect which his Florida activities produced in California, South had other contacts with California sufficient to permit the courts of that state to assume personal jurisdiction over him in this action." (J.A. 115).

b. The Authors Of The Restatement Have Clearly Adopted The Logic Of The "Effects Doctrine".

Section 37 of the RESTATEMENT (SECOND) CONFLICT OF LAWS (1971), states:

> "A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individuals relationship to the state make the exercise of such jurisdiction unreasonable." (at p. 156).

The rationale behind the "effects doctrine" is that:

> "A state has a natural interest in the effects of an act within its territory even though the act itself was done elsewhere."

The Restatement posits three situations to which this principle might apply:

> (1) The act was done with the intention of causing effects in the state; (2) the act, although not done with the intention of causing effects in the state, could reasonably have been expected to do so; and (3) the act was not done with the intention of causing effects in the state and could not reasonably have been expected to do so." (at p. 157).

With respect to the first of three situations, presented at bar, the Restatement continues:

> **"The act may have been done with the intention of causing effects in the state. If so, the state may exercise the same judicial jurisdiction over the actor, or over the one who caused the act to be done, as to causes of action arising from these effects as it could have exercised if these effects had resulted from an act done within its territory. . . . So one who intentionally shoots a bullet into a state is as subject to the judicial jurisdiction of the state as to causes of action arising from the effects of the shot as if he had actually fired the bullet in the state. . . ."**

The analogy of shooting a bullet across state lines to the facts at bar is perfect. Rather than being the primary

participants in the shooting of a bullet into California, Appellants were primary participants in the sending of a known, equally pernicious object into California, the devastating article about Appellee. Furthermore, they knew Appellee resided in California, the article would be widely circulated there, and that the subject of the article involved California activities.

The compelling logic behind Section 37 as applied at bar is simple: traditional notions of fair play and substantial justice are not offended in subjecting to jurisdiction individuals engaging in tortious conduct knowing it will have devastating effects in a distant state. To conclude otherwise would be to allow wrongdoers to artificially erect state boundaries for their jurisdictional benefit when they ignored those same boundaries in doing their wrong. Neither traditional notions of fair play and substantial justice, nor the "interstate judicial system's interest in obtaining the most efficient resolution of controversies"[32] poses any impediment to a state's self-defensive exercise of jurisdiction in such circumstances.

c. Courts Considering Section 37 Have Generally Adopted It And Its Principles.

Numerous state and federal courts considering Section 37 of the Restatement, have expressly adopted it.[33]

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[32] *World-wide Volkswagen Corp. v. Woodson*, 444 U. S. 286, 292 (1980).

[33] See, for example, *Mississippi Interstate Express, Inc. v. Transportation, Inc.*, 681 F. 2d 1003 (5th Cir. 1982) (applying § 37 to a breach of a Mississippi centered contract and resultant damage in Mississippi); *Rusack v. Harsha*, 470 F. Supp. 285, 291 (M. D. Pa. 1978) (where a copy of a defamatory letter was sent into the state of Pennsylvania, the court relying on § 37 found jurisdiction in a libel action resulting therefrom); *Anderson v. Luitjens*, 311 Minn. 203, 247 N. W. 2d 913 (1976) (adopted § 37 in connection with torts causing injury in the state); *Blessing v. Prosser*, 141 N. J. Super. 548, 359 A. 2d 493, 494 (1976) (§ 37 applied to effects not even causatively related to claim); *Abbott Power Corp. v. Overhead Electric Co.*, *supra*.

The commentators have also looked favorably on that Section's "effects principle." Clearly: *The Length of the Long Arm, supra,* at pp. 299-300.[34]; Reese and Galston; *Doing An Act Or Causing Consequences As Bases Of Judicial Jurisdiction,* 44 IOWA L. REV. 249 (1958).[35] *See* 4 C. WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1069 (1969).[36]

Further, the overwhelming number of states which have considered the application of the "effects doctrine" to facts similar to those presented here, tortious conduct outside of a state causing injurious effects within, have concluded that it provides ample due process basis for jurisdiction.[37] Some have even embodied that principle

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[34]Professor Clearly in analogizing to the English view with respect to criminal law, found such effects principle consistent with *International Shoe.*

[35]Stating at p. 260:

> "Causing consequences in a state by means of an act done elsewhere may afford the state a basis of judicial jurisdiction over the actor. The clearest situation is where an act is done in one state with the intention of causing consequences in another."

[36]"Even an act done outside the state that has consequences within the state should suffice as a basis for jurisdiction in a suit arising from those consequences if the effect could reasonably have been expected to follow from defendant's conduct."

[37]*See,* for example, *Brown v. Flowers Industries, Inc.,* 688 Fed. 2d 328 (5th Cir.) *cert. denied,* at 51 U. S. L. W. 3650 (1983); *Vishay Intertechnology, Inc. v. Delta International Corporation,* 696 Fed. 2d 1062 (4th Cir. 1982); *Paolino v. Channel Home Center,* 668 F. 2d 721, 724 (3rd Cir. 1981); *Bangor Punta Operations, Inc. v. Universal Marine Company, Ltd.,* 543 F. 2d 1107, 1110 (5th Cir. 1976); *National Egg Company v. Bank Leumi le-Israel, B.M.,* 504 F. Supp. 305 (N. D. Ga. 1980); *Pfeiffer v. International Academy of Biomagnetic Medicine,* 521 F. Supp. 1331 *(W. D. Mo. W. D. 1981) ("commission of a tortious act within* the state includes extraterritorial acts producing actionable consequences in Missouri" at 1335); *Hitt v. Nissan Motor Company, Ltd.,* 399 F. Supp. 838, 847 (S. D. Fla. 1975), vacated

(Continued on next page)

in statute.[35]

d. The Decisions Of This Court Support Acceptance Of The "Effects Doctrine".

The decisions of this court have tacitly accepted the "effects doctrine" as applied to tortious conduct, and particularly to intentional, and foreseeable tortious conduct.

McGee v. International Life Ins. Co., supra, cited with approval the case of *Smyth v. Twin State Improvement Co.*, 116 Vt. 569, 80 A. 2d 664 (1951). In *Smyth*, the Court was confronted with isolated negligent tortious activity in the forum. Thus, in adopting the position that "it is sufficient for purposes of due process that the suit was based on a contract which had a substantial connection with that state," and citing *Smyth, supra,* in support of this position, *McGee* strongly implies that isolated tortious conduct would also be sufficient to meet due process.

As Justice Brennan has stated:

"[J]urisdiction can be based strictly on out-of-state acts having foreseeable effects in the forum state.

(Continued from previous page)

on other grounds, 552 F. 2d 1088 (5th Cir. 1977); *Maricopa County v. American Petrofina, Inc.*, 322 F. Supp. 467 (N. D. Cal. 1971); *Grey v. American Radiator and Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N. E. 2d 761 (1961); *Ehlers v. United States Heating and Cooling Manufacturing Corp.*, 267 Minn. 56, 124 N. W. 2d 824 (1963); *Dodgett v. Electronics Corp of America*, 93 Idaho 26, 454 P. 2d 63 (1969); *De Cook v. Environmental Secur. Corp., Inc.*, 258 N. W. 2d 721 (Ia. 1977); *Kailieha v. Hayes*, 56 H. 306, 536 P. 2d 568 (1975); *State ex rel. Academy Press v. Beckett*, 282 Or. 701, 581 P. 2d 496 (1978).

[35] *For example, see,* MICH STAT. ANN. § 27A.705(2) (1976) ("The doing or causing an act to be done, or consequences to occur, in the state resulting in an action for tort.") N. D. CENT. CODE, Rules Civ. P. 4(b)(2)(C) (Supp. 1981) ("committing a tort within or without this state causing injury to another person or property within this state") 42 PA. CONS. STAT. ANN. 5322(a)(4) (Purdon 1981) ("causing harm or tortious injury in this commonwealth by an act or omission outside this commonwealth"); *See also,* S. D. CODIFIED LAWS ANN., Tit. 15, ch. 15-7-2(2) (1967).

> E.g., *McGee v. International Life Insurance Co., supra; Gray v. American Radiator and Standard Sanitary Corp., supra;* Restatement, Section 37." *Shaffer v. Heitner,* 433 U. S. 186, 226 (1976), (Brennan, J., concurring and dissenting opinion).

This proposition has been firmly established among the federal circuit courts.[39]

Recent minimum contacts cases of this Court support application of the "effects doctrine" to intentional tortious activity. *Kulko v. California Superior Court, supra,* discussed the "effects test" of Restatement § 37. While refusing to apply it in the non tort context presented, the Court made clear that based upon

> "the examples accompanying § 37 in the Restatement, *this section was intended to reach wrongful activity outside of the State causing injury within the State, see, e. g.,* Comment *a,* p. 157 (shooting bullet from one State into another), . . ." (Emphasis added). 436 U. S. at p. 96.

Worldwide Volkswagen Corp. v. Woodsen, supra, the only recent minimum contacts case before this Court dealing with alleged tortious conduct outside a forum causing injurious effects within, did not so much as cite, let alone discuss, Restatement § 37[40] However, it is clear from

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[39] *Brown v. Flowers Industries, Inc., supra, Vishay Intertechnology, Inc. v. Delta International Corporation, supra; Paolino v. Channel Home Center, supra; Bangor Punta Operations, Inc. v. Universal Marine Company, Ltd., supra; Great Western United Corp. v. Kidwell,* 577 F. 2d 1256 (5th Cir. 1978) *rev'd other grds* 443 U. S. 173 (1979); *Travis v. Anthes Imperial Limited,* 473 F. 2d 515 (8th Cir. 1973); *In Flight Devices Corporation v. Van Dusen Air, Inc.,* 466 F. 2d 220 (6th Cir. 1972).

[40] *Worldwide Volkswagen* did not intend to preclude the tortious conduct without the forum/injury within exercise of long-arm jurisdiction *Paolino v. Channel Home Center, supra,* 668 F. 2d at 725.

its analysis that jurisdiction in the facts presented at bar is consonant with due process.

In *Worldwide Volkswagen Corp.*, a New York automobile retailer and a New York distributor, among others, were sued in Oklahoma where an automobile sold by them in New York happened to be involved in a collision. This Court rejected the argument that simply because an automobile is mobile, and could therefore foreseeably find its way to any state, defendants could be subjected to jurisdiction in any state. The Court stated:

> "This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. *Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being hailed into court there.* [Citations omitted]" (Emphasis added.) 444 U. S. at p. 297.

If this were not the case:

> "[e]very seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel." 444 U. S. at p. 296.

Worldwide Volkswagen rejected the notion that jurisdiction may be predicated solely upon an act committed outside of the forum with no intention of causing effects therein when the foreseeability is no more specific than that the product could end up anywhere. Note, 49 U. M. K. C. L. Rev. 78, 82 (1980-81).[41]

Foreseeability as utilized in *Worldwide Volkswagen* was for the purpose of

> "giv[ing] a degree of predictability to the legal system that allows potential defendants to structure their

[41] "However, *the mere chance circumstance of a product being in the state is not* an adequate contact."

primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." 444 U. S. at 297.

The facts at bar present the very type of foreseeability which *Worldwide Volkswagen* found significant. The libelous article has not been appointed Appellants' agent for service of process in any and every state in which it might circulate. The question of whether Appellants could be subject to jurisdiction in any state besides California is not presented.[42]

A person involved in publication of an article can readily anticipate consequences in the state where the subject of a written attack resides, when it is known that the writing will be distributed there. Thus, *Worldwide Volkswagen's* concern that a defendant be able to "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit," (444 U. S. at 297) is easily satisfied. Not only did Appellants engage in conduct intentionally and knowingly directed at California, they were specifically advised of its falsity and potential for injury by Appellee and her husband before publication.

California has merely done what any interpretation of the due process clause would permit, protect itself and its residents from those who would engage in conduct outside its borders intended to injure it or its residents.

3. The Better Reasoned Decisions Of State And Federal Courts Justify Jurisdiction.

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[42] If the present matter related to an effort to subject Appellants to jurisdiction in, for example, Nebraska, having no apparent relationship to the plaintiffs and/or subject matter of the article, simply because the Enquirer had circulation there, than a close question under *Worldwide Volkswagen* might be presented.

In *Church of Scientology of California v. Adams, supra,* the court sensitively dealt with the question of when jurisdiction in libel actions comports with due process, stating:

> "In a libel case, however, we do not think the likelihood that an offending publication will enter a forum is a fair measure of the reasonableness of the exercise of jurisdiction over a publisher. The nature of the press is such that copies of most major newspapers will be located throughout the world, and we do not think it consistent with fairness to subject publishers to personal jurisdiction solely because an insignificant number of copies of their newspapers were circulated in the forum state. *In a defamation case, therefore, the appropriate jurisdictional analysis should be to determine whether or not it was foreseeable that a risk of injury by defamation would arise in the forum state.* . . . 584 F. 2d at 897-898. (Emphasis added.)
>
> "In the present appeal, California events were not the topic of the allegedly actionable writings, nor were California readers a principal or secondary target of the articles. No research was done in California and the articles were not written in that state. The only mention of a California resident was by way of reference to a person who spoke as a representative of the national Scientology organization." 584 F. 2d at 898.

The precepts of *Adams* are particularly applicable at bar. Here, the article deals specifically with a California resident, California actions, California readers were obviously the primary target of the article, and research by telephone and personal visit clearly focused on that state.

Another pertinent authority is *Brown v. Flowers Industries, supra,* to which this Court denied certiorari just last term. There, a Mississippi resident sued, among others, an individual who was an Indiana resident and president of one of the corporate defendants. The complaint alleged conspiracy to cause economic and other injuries accomplished by means of a single defamatory telephone

call from the individual in Indiana to Mississippi. The Fifth Circuit overturned the trial court's conclusion that basing jurisdiction upon the single defamatory telephone call into the state of Mississippi did not comport with due process, stating:

> "The number of contacts with the forum state is not, by itself, determinative. [citations omitted]. What is more significant is whether the contacts suggest that the non-resident defendant purposely availed himself of the benefits of the forum state. [citation omitted]."
>
> " 'When a defendant purposely avails himself of benefits and protection of the forum's laws—by engaging in activity . . . outside the state that bears reasonably foreseeable consequences in the state—maintenance of the law suit does not offend traditional notions of fair play and substantial justice.' [citation omitted.]"[43] 688 F. 2d at 333.

Many state and federal authorities considering foreseeability and other factors have sustained jurisdiction under facts far less compelling than at bar.[44]

4. Jurisdiction Is More Compelling At Bar Than in Products Liability Cases.

Appellant's effort to limit the "effects principal" to products liability cases is unconvincing (AB 29-30). If

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[43]*See also, Vishay Intertechnology, Inc. v. Delta International Corporation, supra,* where the court concluded that telephonic and written communication initiated by defendant from California and sent into the forum, North Carolina, constituted tortious conduct within that state, subjecting the defendant to jurisdiction.

[44]*McGuire v. Brightman,* 79 Cal. App. 3d 776, 145 Cal. Rptr. 256 (1978); *Novel v. Garrison,* 294 F. Supp. 825 (N. D. Ill. 1969); *Pegler v. Ed Sullivan,* 6 Ariz. 338, 432 P. 2d 593 (1967) (mere knowledge that a show would be telecast in Arizona alone "made the action of Sullivan and Random House voluntary, purposeful, reasonable, forseeable, and calculated to have an effect in Arizona," sufficient to subject defendant Sullivan to jurisdiction); *Process Church of the Final Judgment v. Sanders,* 338 F. Supp. 1396 (N. D. Ill. E. D. 1972).

such cases "pushed due process to the very limits" (AB 29), then the facts presented at bar are more safely within its limitations. For we are not concerned with mere negligence untargeted for any particular state, but rather, intentional acts aimed with focused precision at California.

5. It Is Appropriate To Consider Convenience After Looking At Contacts.

Contrary to Appellants' assertion (AB 20-23) this Court's authorities have indicated the propriety of considering convenience. *See, International Shoe v. Washington, supra* at 317.[45] This is of course not to say that convenience is a substitute for the due process mandated contacts, but it is certainly a proper consideration in a close case.

The California Court of Appeal considered convenience only after first determining that consistent with the effects test, ample constitutionally mandated minimum contacts existed. (J.A. 117-118).

Once convenience is considered, the propriety of the lower court's decision is clear. Both Appellants, as members of the media, utilize modern communications and transportation as an integral part of their activity. To require use of those same means of communication and transportation to litigate in a place where they knew they were targeting a deleterious story provides no inconvenience or unfairness.

Furthermore, since the Enquirer has not disputed jurisdiction, as a practical matter, Appellants, who are represented by the same counsel, are likely to be represented by

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[45] "An estimate of the inconveniences which would result . . . from a trial away from its 'home' or principal place of business is relevant. . . ."

the Enquirer counsel at no expense to themselves.[46] Preventing jurisdiction over Appellants will only lead to multiple litigation based upon the same article; the Enquirer is being sued in California, Appellants would have to be sued elsewhere. Most of the witnesses with respect to the truth or falsity of the story are in California, the injury to Appellee and its most obvious consequences occurred in California and its proof would likely be through use of California residents.

Finally, it is difficult to posit inconvenience to Appellants when Calder defended the *Carol Burnett v. National Enquirer, Inc. et al.* lawsuit there, and was in attendance during the entire trial thereof, and South has been to California on so many occasions that he even thought of moving there.

Under all these circumstances, inconvenience to Appellants is miniscule.

Finally, as discussed in Appellee's Motion to Dismiss or in the Alternative Affirm, pp. 16-17, which are incorporated herein by reference, under applicable authorities even if this Court were to accept a special First Amendment jurisdictional preference, Appellants would still be subject to jurisdiction consistent with the Constitution.

C. APPELLANTS MAY NOT INSULATE THEMSELVES FROM JURISDICTION SIMPLY BECAUSE THEIR INTENTIONAL, TORTIOUS CONDUCT OCCURRED IN THE COURSE OF CORPORATE EMPLOYMENT.

Seeking yet another way to ignore the fact of their own intentional wrongful conduct, Appellants contend that

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[46] Sponsler, *Jurisdiction Over The Corporate Agent: The Fiduciary Shield*, 35 WASH. & LEE L. REV. 349, 364-365 (1978).

due process mandates that "jurisdiction over a foreign corporation does not carry with it jurisdiction over the corporation's employees," (AB 25-26). However, this misstates the issue presented for Appellee does not claim that jurisdiction over the Enquirer automatically carries with it jurisdiction over all its employees.

The issue correctly stated is whether the due process clause automatically insulates a corporate employee from jurisdiction for tortious acts he himself performs and contacts he himself establishes with a forum, simply because those contacts occurred while working for a corporate employer.

The foregoing distinction reflects the significant difference between subjecting the Enquirer's night janitor to jurisdiction in California for the subject article simply because the Enquirer is subject to jurisdiction and subjecting the reporter and the president and editor, primary participants in alleged wrongdoing, to jurisdiction for their own actual participation in and control over the article.

1. Only If A Fiduciary Shield Is Mandated By Due Process Is Reversal Appropriate.

This Court should reverse the California Court of Appeal if, and only if, it determines that the so-called "fiduciary shield" is mandated by due process. If it is not so mandated but is simply a matter of discretionary state judicial gloss to their long-arm statutes, the clearly better interpretation, than the California Court of Appeal's decision not to adopt the fiduciary shield is properly within that state's power.

2. The Fiduciary Shield Concept Having Arisen And Been Perpetuated By Confusion Should Not Be Further Elevated To Constitutional Significance.

The "fiduciary shield doctrine having come into existence through misunderstanding and having thrived on

lack of articulation and analysis, should be allowed to fade away in the course of more reasoned application of established principles." Sponsler, *Jurisdiction Over the Corporate Agent: The Fiduciary Shield*, 35 WASH. & LEE L. REV. 349, 365 (1978).

In the only reasoned and critical analysis of the "fiduciary shield doctrine," Professor Sponsler observed that:

> "The analyses by the courts in the cases in which this 'fiduciary shield' theory has been discussed have been generally deficient in treating alike greatly divergent fact patterns which the cases have presented and *in failing to differentiate between the issue of substantive liability and the issue of jurisdiction* . . . (at 350)[47]

Professor Sponsler's careful analysis of the history of the fiduciary shield doctrine led him to conclude:

> "Making the corporate agent amenable to the court's jurisdiction would seldom involve any hardship to the agent greater than that implicit in being sued in any state. . . ." (at p. 364).
>
> " . . . *The conclusion that the court has jurisdiction over the corporation should not mean that it has jurisdiction over the individual defendant, however, the fact that the individual defendant's actions otherwise meet the terms of the long-arm statute should not be affected by the fact that he has acted in a corporate capacity.* (Emphasis added.) (at p. 365).

The proper approach to jurisdiction over corporate agents is to utilize the same jurisdictional principles applied in any other situation rather than resort to blanket immunity.[48]

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[47] One such case, generally cited for the establishment of the fiduciary shield theory, is *Boas & Associates v. Vernier*, 22 A. D. 2d 561, 257 N. Y. S. 2d 487 (1965).

[48] "Ignoring any notion that acting in a corporate capacity somehow provides the defendant with a jurisdictional shield eliminates unfairness to the plaintiff and permits a systematic application of jurisdictional principles as they are applied in other contexts." Sponsler, 35 WASH. & LEE L. REV. 349 at p. [illegible]

Ignoring the claims of fiduciary shield will allow proper consideration of this matter pursuant to the precepts of *International Shoe*, without resolving it by Appellants' resort to magical and unwarranted incantations of immunity.

3. Most Authorities Have Found The "Fiduciary Shield Doctrine" Inapplicable To Corporate Employees Who Participate In The Commission Of A Tort.

In *In Re Mid-Atlantic Toyota Anti-Trust Litigation*, 525 F. Supp. 1265 (D. C. Md. 1981) the district court rejected a claim that an individual's participation as a corporate officer in meetings concerning a price-fixing conspiracy was subject to "fiduciary shield" protection from jurisdiction, stating:

> "The 'fiduciary shield' does not apply where a corporate officer has *allegedly* committed a personal or business tort within the state. . . . In such a situation, there would be personal jurisdiction over the defendant in his individual capacity, under the section of the long arm statute providing for personal jurisdiction over a person who commits a tortious act within the state." (Emphasis added.) 525 F. Supp at 1270-1271.

The *Mid-Atlantic Toyota* case reflects the overwhelming authority to the effect that participation in tortious conduct by a corporate officer or employee may not be immunized by the fiduciary shield doctrine. *See, Wilbourn v. Mostek Corp.*, 537 F. Supp. 302 (D. Colo. 1982), *All American Car Wash v. National Pride Equipment*, 550 F. Supp. 166 (W. D. Okla. 1981).[49] *Donner v. Tams-*

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[49] "Corporate officers are personally liable for alleged tortious conduct of the corporation if they personally took part in the commission of the tort. . . . Contacts sufficient to support personal liability of a corporate officer are sufficient to support *in personam* jurisdiction [Citation omitted]" 550 F. Supp. at 169.

Witmark Music Library, Inc., 480 F. Supp. 1229 (E. D. Pa. 1979); *Barrett v. Bryant*, 290 N. W. 2d 917, 921 (Ia. 1980). *See also, Kinstler v. Saturday Evening Post Co.*, 507 F. Supp. 113 (S. D. N. Y. 1981) a libel action, where after giving lip service to a "fiduciary shield" doctrine, the Court described it as "a flexible doctrine designed to achieve the ends of justice and should not be woodenly applied" (507 F. Supp. at 115), and failed to apply it determining simply that "fair play and substantial justice" were satisfied.

It would be most anomalous for state law to subject a participant in a libel to liability while at the same time establishing a state created jurisdictional immunity making it easier to evade answering for those very acts. *Donner v. Tams-Witmark Music Library, Inc., supra*, at p. 1233. For further criticism of the fiduciary shield see *Lighting Systems, Inc. v. International Merchandising, Inc.*, 464 F. Supp. 601 (W. D. Pa. 1979); *Leshko v. Don-Oliver, Inc.*, 86 FRD 343 (M. D. Pa. 1979).

4. Those States Which Have Adopted A Fiduciary Shield Doctrine Have Generally Done So As A Matter Of State Policy Not Constitutional Mandate.

Though Appellants rely heavily on a line of federal district court cases for its claim of jurisdictional immunity for corporate employees, even a cursory review of those cases suggests their lack of applicability to this matter.

Most emanate from New York, or from jurisdictions containing long-arm statutes significantly narrower than California's. Appellants rely on *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322, 1347 (E. D. N. Y. 1981), *Grove Press, Inc. v. CIA*, 483 F. Supp. 132, 135 (S. D. N. Y. 1980), and *Marine Midland Bank v. Miller*, 664 F. 2d 899, 903 (2d Cir. 1981) which articulate a "fiduciary shield"

doctrine shielding officers and employees from jurisdiction based upon acts which they performed in their corporate capacity. However, as stated in *Marine Midland Bank v. Miller, supra,* and as logic compels, this doctrine:

> *"is not a constitutional principle, but is rather a doctrine based on judicial inference as to the intended scope of the long-arm statute* [of New York]" 664 F. 2d at 902, fn. 3 (emphasis added).

Appellants' other authorities allegedly supporting an asserted fiduciary shield are largely inapposite.[50]

Those authorities which Appellants suggest establish the fiduciary shield doctrine as a matter of due process, generally deal with an entirely different situation than presented at bar. They seek to subject corporate officers and employees to jurisdiction based exclusively upon existence of jurisdiction over their corporate employer, without reference to the individual's role in those contacts.

So, for example, in *State ex rel. Miller v. Internal Energy Management Corp.,* 324 N. W. 2d 707 (Ia. 1982),

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[50]*Idaho Potato Commission v. Washington Potato Commission,* 410 F. Supp. 171 (D. Idaho 1975) relies primarily on the New York authorities; *Weller v. Cromwell Oil Co.,* 504 F. 2d 927 (6th Cir. 1974) dealt with construing Ohio's long-arm statute rather than constitutional interpretation ("in this appeal) we construe Ohio's long-arm statute . . . (at p. 928) and "[W]e are not willing to extend the Ohio long-arm statute to cover this case." (at p. 931); *Escude Cruz v. Ortho Pharmaceutical Corp.,* 619 F. 2d 902 (1st Cir. 1980); dealt with a Puerto Rican long-arm statute significantly narrower than California's; *Wilshire Oil Co. v. Riffe,* 409 F. 2d 1277 (10th Cir. 1969) a suit by a corporation *against its own former employees* related to their acts when employed, relied on New York authority, dealt with a narrower long-arm than California and was decided on the grounds that the contacts with the form were weakly related to the cause of action; *Hurletron Whittier, Inc. v. Barda,* 82 Ill. App. 3d 443, 402 N. E. 2d 840 (1980) dealt with a suit by a corporation against its own officer and the court concluded that "the tenuous nature of defendant's business contacts with Illinois will not support the exercise of jurisdiction." at p. 843.

the Iowa Supreme Court concluded that it would apply the fiduciary shield "doctrine as a due process limitation on the exercise of jurisdiction." (at p. 711). However, in reaching its conclusion, the court made clear that the factual situation it was considering was quite different than that presented here. It stated:

> "[W]hether the minimum contacts established by [the corporate employer] *can be attributed to them* on an individual basis." (Emphasis in original) 324 N. W. 2d at 711.
>
> "This appeal thus turns on whether the fiduciary shield doctrine is applicable to insulate defendants from jurisdiction that Iowa courts have obtained over their corporate employer." 324 N. W. 2d at 711.
>
> "[G]enerally a non-resident corporate agent is not individually subject to a court's jurisdiction *on the basis of jurisdiction of the corporation itself.*" (Emphasis added) 324 N. W. 2d at 711.

Finally, the Iowa Supreme Court in *Miller* cited with approval, its own ruling just two years earlier in *Barrett v. Bryant, supra,* at 921 finding the fiduciary shield inapplicable where the corporate employee was engaged in tortious conduct.[51]

At most, *Miller* supports the conclusion that holding an employee subject to jurisdiction solely because of his *relationship* to his corporate employer, without regard to his involvement with the tortious conduct and the forum state, may raise due process problems.[52]

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[51] "However, that doctrine [fiduciary shield] has no application here, since jurisdiction over the individual defendants is not predicated on jurisdiction over [their corporate employer] but upon their own activities. . . . '[T]he fact that the individual defendant's actions otherwise meet the terms of the long-arm statute should not be affected by the fact that he has acted in a corporate capacity." (290 N. W. 2d at 921).

[52] 4 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1069 (Supp. 1982) reiterates this same notion of fiduciary shield:

(Continued on next page)

At bar, as in *Barrett* but unlike *Miller*, Appellants were held subject to jurisdiction based upon their own involvement in the tortious conduct, not simply because their employer, the Enquirer, was so subject.[53]

Appellants' reliance on Ninth Circuit authority of *Forsythe v. Overmeyer*, 576 F. 2d 779 (9th Cir. 1978) *cert. denied*, 329 U. S. 864 (1978) and *Chem Lab Products, Inc. v. Stepanek, supra*, is similarly misplaced.

The language in *Forsythe* suggesting the proposition for which Appellants cite it, is mere dictum. Further, *Forsythe* dealt with a commercial transaction not intentionally tortious conduct. Finally, in support of the proposition under discussion, *Forsythe* relies only upon the one-half (½) page opinion of *Chem Lab Products, Inc. v. Stepanek, supra*, which case found no "personal acts" with California, making clear that "personal acts" meant contact with California on behalf of a corporation or *otherwise*. In other words, it was only by virtue of the corporations being subject to jurisdiction that jurisdiction over the individual was sought.

Appellants, being significant participants in the publication of the libelous article, may be subject to liability for its publication. Prosser, *Handbook of the Law of Tort*, § 113 (4th Ed. 1971)[54]; 50 Am. Jur. 2d, *Libel and Slander*

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"Thus, jurisdiction over individual officers and employees of a corporation *may not be predicated on the court's jurisdiction over the corporation itself.* . . ."

[53]*Chem Lab Products, Inc. v. Stepanek*, 554 F. 2d 371, 372 (9th Cir. 1977) also deals with asserting jurisdiction over a corporate officer because of his relationship with the corporation though he had no involvement in the conduct subject to suit. Thus, as in *Miller*, the due process implications are understandable.

[54]"Likewise everyone who takes part in the publication, as in the case of the owner, editor, printer, vendor, or even carrier of a newspaper is charged with publication. . . ."

§ 321, and may also be subject to jurisdiction based thereon.

5. Reasonableness And Traditional Notions Of Fair Play And Substantial Justice Suggest No Due Process Mandate For A Fiduciary Shield.

International Shoe Co. v. Washington, supra, sets forth the due process standard for jurisdiction, as stated above. Refusing to immunize tortious conduct, and especially intentional tortious conduct, simply because it was accomplished while the perpetrator happened to be employed by a corporation, would in no way infringe "traditional notions of fair play and substantial justice." For, if it does not offend such notions to subject knowing participants in wrongful conduct to jurisdiction in that state, it is no more offensive to subject those defendants to jurisdiction for the very same acts simply because they were accomplished while in the corporate employ.

To conclude otherwise would render the corporate form a safe haven for those who would engage in intentionally tortious conduct. The corporate form could be created to insulate wrongdoers thus allowing anomolous results to follow.[15] It would be most surprising if constitutional significance attached to the fact that wrongdoing was accomplished in the corporate rather than individual capacity. For, "[n]o man ought to have a right to defame others under colour of a performance of the duties of his office." 25 STORY, COMMENTARIES ON THE CONSTITUTION, § 863, p. 329 (1933).

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[15]For example, consider the situation where an out-of-state attorney coming to California to take a deposition, rents a car and on his way to a deposition, by reason of his negligence, is in an automobile accident. Under appellants' theory whether he would be subject to California jurisdiction for a lawsuit resulting from the accident would turn upon whether he was a sole practitioner operating individually or had a professional corporation for which he was employed.

D. CALIFORNIA'S ASSERTION OF JURISDICTION WOULD HAVE NO OBJECTIONABLE EFFECT ON INTERSTATE COMMERCE.

Appellants' Commerce Clause argument has been properly relegated by them to a few short pages near the end of their brief. For this argument is meritless in light of pertinent authority and the facts which Appellants themselves have asserted.

It has been stated that:

> "[W]here the defendant contends that the maintenance of plaintiff's suit in the state would constitute an undue burden on interstate commerce, the burden is on the defendant to establish the truth of such contention." 15A AM. JUR. 2d, *Commerce*, § 98, p. 466 (1976); *Kirkland v. Atchison, T. & S. F. R. Co.*, 104 Ga. 200, 121 S. E. 2d 411, 416 (1961).

Yet Appellants make no adequate showing of inordinate burden on interstate commerce. In fact, they assert that they have no stake in the sales activity of their employer and no control over it. (AB 27). In light of their self-proclaimed lack of involvement in the commerce of their employer, it is impossible to find any additional burden on interstate commerce by subjecting them to jurisdiction.

Appellants cite *Michigan C. R. R. v. Mix*, 278 U. S. 492 (1929); *Atchison, T. & S. F. Ry. v. Wells*, 265 U. S. 101 (1924); *Davis v. Farmers Co-operative Equity Co.*, 262 U. S. 312 (1923); *Denver & R. G. W. R. R. v. Terte*, 284 U. S. 284 (1932) in support of their claim that "state jurisdictional statutes as applied to interstate enterprises were rejected." (AB 46).

What Appellants ignore are the most salient features of those cases which distinguish them from the facts here presented; the forum was not the true residence of the

plaintiff[56] (in *Mix* plaintiff moved to the forum after the claim arose for purposes related to the initiation of the lawsuit) and all dealt with efforts to subject *common carriers* to jurisdiction. This later fact may explain the statement at 15A Am. Jur. 2d, *Commerce*, § 98 (1976) that:

> "Nevertheless, courts may be deprived of jurisdiction which they would otherwise possess by the fact that the carrying on of litigation there imposes a serious burden on *an agency of interstate commerce.*" (Emphasis added.)

See also, Louisell and Hazard, Pleading and Procedure, p. 280, (4th ed. 1979), indicating that "the Commerce Clause may do so [impose some special limit on territorial jurisdiction] *in cases involving interstate carriers.*" (Emphasis added.)

In *International Harvester Co. v. Ky.*, 234 U.S. 579, 587 (1914) this court unequivocably rejected the contention that "so long as a foreign corporation engages in interstate commerce only, it is immune from the service of process under the laws of the state in which it is carrying on such business."

At bar, there is no direct burden on interstate commerce and at most only an inconsequential affect thereon, which has been found permissible. *S. C. Hwy. Dept. v. Barnwell*, 303 U.S. 177, 184-185 (1937).

Appellants' other authorities are equally unavailing. *Nippert v. City of Richmond*, 327 U.S. 416 (1946) a "drummer case," was not even a challenge to a state's assertion of jurisdiction. It was a commerce clause challenge to a tax on persons engaging in the business of solicitation. Such tax was struck down because:

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[56] *International Milling Co. v. Columbia Transport Co.*, 292 U.S. at 520, distinguished these cases on this very basis stating:

> "Residence, however, even though not controlling is of high significance."

> "Read in their proper historical setting these cases may be said to support the view that this kind of *a tax is likely to be used 'as an instrument of discrimination against interstate or foreign commerce.'*" 327 U. S. at 424. (Emphasis added.) *See also,* 327 U. S. at 434.

Those cases may also reflect the particular sensitivity of interstate commerce to discriminatory taxation for "the power to tax involves the power to destroy; . . ." *McCulloch v. Maryland,* 4 Wheat. 316, 431 (1819). No exertion of taxing power nor discriminatory actions are involved at bar.

Froning & Deppe, Inc. v. Continental Illinois Bank & Trust Co., 695 F. 2d 289 (7th Cir. 1982), cited by Appellant is also inapposite, for it is a due process case not even mentioning the Commerce Clause.

Also inapposite is *Erlanger v. Cohoes Fibre Mills,* 239 F. 2d 502 (4th Cir. 1956), a breach of contract case where the court indicated that the parties could have agreed to jurisdiction in their contract and chose not to.

Finally, no case cited by Appellants dealt with the allegedly intentional tortious conduct aimed at the forum, which is presented here.

E. KULKO V. SUPERIOR COURT, SUPRA, CONTROLS THE QUESTION OF THIS COURT'S JURISDICTION.

The case of *Kulko v. Superior Court, supra* at 90 n. 4, specifically and unequivocally stated with respect to a challenge to the application of CALIFORNIA CODE OF CIVIL PROCEDURE § 410.10, the same statute involved here:

> ". . . [T]his case was improperly brought to this Court as an appeal, since no state statute was 'drawn in question . . . on the ground of its being repugnant to the Constitution, treaties or laws of the United States.' 28 U. S. C. § 1257 (2). The jurisdictional statute construed by the California Supreme Court provides that the State's jurisdiction is as broad as the

Constitution permits. See, n. 3, *supra*. Appellant did not argue below that this statute was unconstitutional but instead argued that the Due Process Clause of the Fourteenth Amendment precluded the exercise of *in personam* jurisdiction over him. The opinion below does not purport to determine the constitutionality of the California jurisdictional statute. Rather, the question decided was whether the Constitution itself would permit the assertion of jurisdiction."

Appellants suggest that the key distinction between *Kulko* and the facts at bar is that here Appellants uttered the magic words in the court below, that § 410.10 as applied was unconstitutional (AB 50). However, it is sophistry to believe that this court's jurisdiction with respect to the same state code section would turn on the happenstance of the words used in asserting its claims in the lower courts. For here, regardless of what words were used, the analysis and review by the courts below were identical to that in *Kulko*. "The question decided was whether the Constitution itself would permit the assertion of jurisdiction." Thus, this matter is not within this Court's appellate jurisdiction but should be considered merely a Petition for Certiorari.

IV. CONCLUSION

For the reasons stated, the judgment of the California Court of Appeal should be affirmed.

Respectfully submitted,

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